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No. 99-2035

IN THE SUPREME COURT OF THE UNITED STATES

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CITIZENS FOR A SOUND ECONOMY FOUNDATION, AMERICAN CHEMISTRY COUNCIL, HEALTH INSURANCE ASSOCIATION OF AMERICA, AMERICAN ASSOCIATION OF HEALTH PLANS, AND COALITION FOR ASBESTOS JUSTICE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Kim v. Nash Finch Co.,
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Mattison v. Dallas Carrier Corp.,
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Ornelas v. United States,
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Pacific Mutual Life Insurance Co. v. Haslip,
499 U.S. 1 (1991) ..... *passim*

Pierce v. Underwood, 487 U.S. 552 (1988) 8

Pullman-Standard v. Swint,
456 U.S. 273 (1982) ..... *passim*

Salve Regina College v. Russell,
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TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) ..... *passim*

Waters-Pierce Oil Co. v. Texas,
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OTHER REFERENCES AND AUTHORITIES

Fed R. Civ. Pro. 52(a) 7

Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*,
75 Minn. L. Rev. 1(1990) 22

Douglas Harkin, BMW of North America, Inc. v. Gore: *A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damages*, 60 Mont. L. Rev.
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INTEREST OF *AMICI CURIAE*

The American Tort Reform Association ("ATRA"), founded in 1986 and based in Washington, D.C., is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.* For over a decade, ATRA has filed

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* Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no persons or entities, other

(continued...)

amicus curiae briefs in cases before this Court that have addressed important liability issues, including punitive damages awards.

The National Association of Manufacturers ("NAM") – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

Citizens for a Sound Economy Foundation ("CSEF") is a nonprofit, non-partisan, grassroots organization devoted to educating the public about the benefits of the free market system and a less intrusive government. CSEF's 250,000 members nationwide are everyday citizens who are concerned that larger and larger punitive damages verdicts are being rendered based on weak burdens of proof, irrelevant and even prejudicial evidence, and often

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than the *amici*, have made a monetary contribution to preparation or submission of this brief.

multiple times against the same defendant for the same activity. CSEF's mission includes efforts to restore predictability and fairness in punitive damages law, so that such awards are not meted out in a "litigation lottery" characterized by excessiveness and arbitrariness.

The American Chemistry Council ("ACC") is a nonprofit trade association whose member companies produce, market, and use industrial chemicals. ACC's member companies comprise more than ninety percent of the productive capacity for basic industrial chemicals in the United States.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 290 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility and responsiveness.

The American Association of Health Plans ("AAHP") is a national association for the managed health care community. AAHP's membership includes health maintenance organizations (HMOs), preferred provider organizations, third party health benefits administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 health plans serving nearly 140 million Americans.

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the asbestos litigation environment.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioner's statement of the case.

SUMMARY OF ARGUMENT

This Court's jurisprudence has firmly established that punitive damages awards must satisfy the due process requirements of the United States Constitution. Now, the Court must allow federal appellate courts to exercise the exacting type of

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[1] The Coalition for Asbestos Justice includes the following insurers: ACE-USA, Chubb & Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Kemper Insurance Companies, Liberty Mutual Insurance Group, and the St. Paul Fire and Marine Insurance Company.

ensure that those constitutional guarantees are not simply empty platitudes.

In other contexts, federal appellate courts have traditionally conducted an independent review of the record when determining whether constitutional guarantees are violated in individual factual circumstances. This type of review allows for the preservation of a litigant's constitutional rights and encourages reasoned development of constitutional jurisprudence. The same careful review using a *de novo* standard should be required when a federal appellate court considers whether a punitive damages award is "so grossly excessive as to amount to a deprivation of property without due process of law." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (*quoting Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909)). Without such careful review, defendants are subject to the whims of juries or personal predilections of trial courts. Permitting a discretionary standard of review would give trial judges extraordinary latitude in determining whether punitive damages awards are excessive. This latitude will substantially weaken the due process protections established by this Court – or even render them meaningless.

Because the excessive nature of a punitive award violates a defendant's fundamental constitutional rights, a *de novo* standard of review must be used by state appellate courts as well as federal circuits. Indeed, without directly imposing such a standard on the states, this Court already has encouraged state court use of a more exacting review standard. It did so by suggesting that an adequacy of appellate review by state courts is essential to assure that punitive damages awards satisfy procedural due

process. *See Pacific Mutual Insurance Company v. Haslip*, 499 U.S. 1, 18 (1991). Adopting a deferential standard of review for federal appellate courts while promoting a more exacting standard for state appellate courts will result in inconsistent results and encourage forum shopping.

A *de novo* standard of review would further help assure protection of fundamental constitutional rights. Under a discretionary standard, some federal trial judges may feel that they have the liberty to act as they choose with little regard for appellate scrutiny. On the other hand, under a *de novo* standard, trial judges are likely to self-police their decisionmaking on the constitutionality of punitive damages. Not only will this enhance individual litigants' constitutional protections, it will also encourage consistency and predictability in the development and interpretation of precedent regarding the constitutionality of punitive damages awards. In this way, a *de novo* standard will reduce the need for appeals and ultimately send litigants the message that filing lawsuits is not a direct path to a windfall award – thus helping to ensure that punitive damages will no longer "run wild." *Haslip*, 499 U.S. at 18.

ARGUMENT

I. The Standard Of Review Has Been Historically Dependent Upon The Designation Of The Appellate Issue

In the absence of any specific legislative directive, this Court has historically determined the appropriate standard for appellate review through its characterization of the issue on appeal. There have been four primary designations in this regard:

historic fact, law, mixed question of law and fact, and matters of discretion. While the means by which the Court categorizes the individual issue is not always clearly defined, the applicable standard of review is always dependent on the designation given to the individual issue.

Issues of fact determined by a jury are given deferential review in accordance with the Seventh Amendment of the United States Constitution. When determined by a trial court, factual findings are reviewed for clear error. *See* Fed. R. Civ. Pro. 52(a). As this Court explained:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . ."

Townsend v. Sain, 372 U.S. 293, 310 n.6 (1963) (*overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)) (citation omitted). Issues of law, on the other hand, are reviewed *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-33 (1991) (citing 28 U.S.C. § 1291).

Mixed questions of law and fact, like issues of law, have been historically examined through *de novo* review. *See Miller v. Fenton*, 474 U.S. 104, 112 (1985). Such mixed questions arise where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] ... standard, or, to put it another way, whether the rule of law as applied to

> the established facts is or is not violated.

Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (*quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). Deferential review of mixed questions of law and fact may, however, be warranted where "probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Russell*, 499 U.S. at 233. In this situation, a lower court's exercise of discretion is afforded great deference and is reviewable only to determine whether the court abused its discretion. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

II. The Determination That A Punitive Award Is "Grossly Excessive" Under The United States Constitution Is A Mixed Question Of Law And Fact Requiring *De Novo* Review

This Court has repeatedly emphasized that excessive punitive damages awards may violate due process rights guaranteed by the United States Constitution. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19 (1991); *see also TXO.*, 509 U.S. at 454; *cf. Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 59 (1996) (prohibition of judicial review of amount of jury's punitive damages award violates the Due Process Clause of Fourteenth Amendment). Punitive damages are subject to substantive due process protection because, as this Court has previously recognized,

> [e]lementary notions of fairness enshrined in our constitutional jurisprudence dictates that a person

> receive fair notice not only of the conduct that will subject him to punishment, *but also of the severity of the penalty that a State may impose.*

Gore, 517 U.S. at 574 (emphasis added); *see also TXO*, 509 U.S. at 454 (Due Process Clause imposes substantive limits "beyond which penalties may not go"); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (setting aside penalty imposed on telephone company because it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause). Because of the substantive due process rights involved, *de novo* review is required.

A. Whether A Punitive Damages Award Is "Grossly Excessive" Is A Mixed Question of Law and Fact

The Court's assessment of the constitutionality of a punitive damages award requires a careful balancing of the competing legal interests at stake. On the one hand, the Court has recognized the fundamental due process right of citizens to be free from arbitrary and oppressive government action. *See TXO*, 509 U.S. at 454. On the other hand, governments must be able to fashion damages that are reasonably necessary to vindicate society's legitimate interests in punishment and deterrence. *See Gore*, 517 U.S. at 568. Recognizing this balance, this Court has ruled that "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id. See also id.* at 586 (Breyer, J., concurring) (constitutional determination focuses on whether award is "grossly

excessive" in relation to legitimate punitive damages objectives). Therefore, whether an award is "grossly excessive" becomes the ultimate question to be resolved in determining whether a constitutional violation has occurred.

Balancing the dual interests of the individual and the State requires a two-part process comporting with the test for ascertaining the existence of mixed questions of law and fact as set forth by this Court in *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also Ornelas*, 517 U.S. at 696. First, the factfinder must determine the "historical facts" of the existence and nature of the defendant's bad acts that give rise to the punitive award. *See Swint*, 456 U.S. at 289 n.19 ("the historical facts are admitted or established..."). Once such underlying factual issues have been resolved, the second step requires that the Court make a legal judgment about those facts. *See id.* ("[T]he issue is whether the facts satisfy the [relevant constitutional] ... standard").

The applicable rule of law for assessing a punitive damages award is undisputed. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court set forth a three-part standard to guide lower courts in determining whether a punitive award is so "grossly excessive" under the circumstances as to violate due process. First, and most importantly, the award must take into account "the degree of reprehensibility of the defendant's conduct." *Id.* at 575. Next, the award must reflect proportionality between the punitive damages award and the actual harm sustained by the plaintiff. *See id.* at 580. Finally, a reviewing court must consider the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 583. The

question then becomes whether, under this standard, the facts contained in the record are legally sufficient to support the amount of punitive damages awarded. *See id.* at 585; *see also Ornelas*, 517 U.S. at 696-97.

The process set out by this Court in *Gore* seeks to place historical facts within a legal framework. It is *not* a re-determination of historical facts themselves. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting) ("Unlike the measure of actual damages suffered which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."). Such a mixed question of law and fact requires *de novo* review. *See Ornelas*, 517 U.S. at 696.

B. The Goals Of Preserving Individual Constitutional Rights And Developing A Clear And Consistent Constitutional Punitive Damages Doctrine Mandate *De Novo* Review

De novo review of mixed questions of law and fact by federal appellate courts does not impermissibly invade the province of the jury. *See New York Times v. Sullivan*, 376 U.S. 254, 285 n.26 (1964) (Seventh Amendment does not preclude Court from independently reviewing mixed questions of facts and law). Moreover, this Court has long held that where facts implicate constitutional issues, the federal appellate court may make an "independent" review of the record. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989); *Bose Corp v. Consumers Union of United States*, 466 U.S. 485 (1984) (First Amendment

issues). And similarly, except in cases involving issues of limited precedential value, such as individual juror bias, the Court has consistently accorded *de novo* review to issues which arise as a result of Fourth, Fifth or Sixth Amendment challenges. *See, e.g.*, *Ornelas*, 517 U.S. at 697 (1996) (ultimate determinations of reasonable suspicion and probable cause require independent appellate review); *Thompson v. Keohane*, 516 U.S. 99 (1995) (in Fifth Amendment context, rejecting argument that "in-custody" determination should be accorded a presumption of correctness); *Davis v. North Carolina*, 384 U.S. 737 (1966) (voluntariness of confession); *Brewer v. Williams*, 430 U.S. 387 (1977) (waiver of Sixth Amendment right to counsel).

The reason for *de novo* review in such circumstances is clear. As the Court explained in *Bose*, federal judges have:

> a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact-finding function be performed in the particular case by a jury or by a trial judge.

466 U.S. at 501. This responsibility requires the appellate court "in proper cases, [to] review the evidence to make certain that [constitutional] principles have been constitutionally applied." *New York Times*, 376 U.S. at 285; *see also Norris v. Alabama*, 294 U.S. 587, 590 (1935) (Court's duty is "to inquire not merely whether a [federal constitutional right] was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made.").

The use of a discretionary standard to assess the constitutional limits of punitive damages awards will relegate the adjudication of fundamental constitutional rights to individual trial judges. While the professionalism and dedication of the federal judiciary is unquestioned, the notion of vesting individual judges with such sweeping power is disconcerting:

> One must concede that unlimited jury discretion – *or unlimited judicial discretion for that matter* – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Haslip, 499 U.S. at 18 (emphasis added). By contrast, independent *de novo* review creates a full and meaningful system of checks and balances to help preserve individual constitutional rights.

In addition to helping assure that an individual's substantive due process rights are preserved, independent *de novo* review of excessive punitive awards by federal appellate courts is necessary to define the contours of the "grossly excessive" test established in *Gore*. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 279 (1985) (*de novo* review is particularly important where there is a need for development of a constitutional norm); Douglas Harkin, BMW of North America, Inc. v. Gore: *A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damages*, 60 Mont. L. Rev. 367, 390-91 (1999) (discussing need for additional guidance on application of *Gore* standards).

As with other ultimate questions bearing on an individual's federal constitutional rights, the "grossly excessive" principle is a "fluid concept" that takes its substantive content from the particular context in which the standard is being assessed. *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (standards for constitutional determination of reasonable suspicion and probable cause to search cannot be reduced to a neat set of legal rules); *Bose*, 466 U.S. at 506 n.25 (constitutional standards regarding suppression of communications do not readily lend themselves to generalized definitions). Particularly in such situations, where

> the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

Miller, 474 U.S. at 114; *see also Ornelas*, 517 U.S. at 697 (independent review is "necessary if appellate courts are to maintain control of, and to clarify, legal principles").

The federal circuit courts, as the "expositors of law," are best situated to carry out the "dual goals of doctrinal coherence and economy of judicial administration." *See Russell*, 499 U.S. at 231. They are also uniquely "structurally suited to the collaborative juridical process that promotes decisional accuracy," as they can devote their attention to comprehensively analyzing and

resolving legal issues without concern for developing the record. *Id.* at 232. Finally, since this Court hears only a small fraction of the cases heard by federal appellate courts, the circuit courts are given the primary responsibility of shaping the contours of the constitutional limitations on excessive punitive damages awards. As a result, the circuit courts must have the independence to exercise their responsibilities through use of *de novo* review.

III. State Appellate Courts Are Similarly Required To Adopt A *De Novo* Standard Of Review In Order To Uphold Federal Substantive Due Process Guarantees

As discussed, the Court's determination of the appropriate standard of review for the amount of punitive damages awards has an important constitutional dimension; it is more than an exercise of the Court's supervisory powers over the lower federal courts. *Compare Daubert v. Merrell-Dow Pharmaceutical Co.*, 509 U.S. 579 (1993) (exercising Court's supervisory powers and establishing factors for ascertaining admissibility of scientific evidence in federal courts). Because the excessiveness of a punitive damages award can violate a defendant's due process rights, state appellate courts, as well as federal tribunals, must review this fundamental issue *de novo*.[2] *See Dickerson v. United States*, 120

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[2] When liability is based on state law, judges must assess and review a punitive damage award under both the federal constitutional standards in *Gore* and applicable state guidelines. *See FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (whether a (continued...)

S. Ct. 2326, 2333 (2000) (with respect to state court proceedings, United States Supreme Court has authority to "enforc[e] the commands of the United States Constitution"); *Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) ("Federal judges may . . . require the observance of . . . special procedures" in state courts "when necessary to assure compliance with the dictates of the Federal Constitution."); *cf. Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no *supervisory authority* over state judicial proceedings. . .") (emphasis added).

Requiring state appellate courts to engage in *de novo* review of trial court rulings on the constitutionality of punitive damages awards under the United States Constitution will preserve constitutional rights and encourage uniform application of the principles enunciated in this Court's punitive damages jurisprudence.

This Court already has ruled that meaningful appellate review of a punitive damages award is a critical part of a constitutionally valid state punitive damages scheme, *see Haslip*, 499 U.S. at 21; *see also Honda*, 512 U.S. at 432. In *Haslip*, the Court upheld Alabama's scheme for awarding punitive damages against a charge that punitive awards in Alabama

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"punitive damage award violates the Federal Constitution is a question separate and apart from Oklahoma state law."). When liability is based solely on federal law, only *Gore* factors apply. *See Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997) (action for employment discrimination under 42 U.S.C. § 1981).

had become the product of "unbridled jury discretion," in violation of the Due Process Clause. The Court ruled that although the jury instructions gave the jury "significant discretion," this discretion was properly constrained by Alabama's requirements for exacting post-verdict and appellate reviews and thus "did not cross the line into the area of constitutional impropriety." *Haslip*, 499 U.S. at 24.

State courts have differed in their understanding and application of *Haslip* and this Court's subsequent punitive damages jurisprudence. Some state courts have consistently interpreted *Haslip* and *Gore* as setting forth a "clear. . . constitutional mandate for meaningful judicial scrutiny of punitive damage awards" at the appellate level. *Honda*, 512 U.S. at 418 (*citing Adams v. Murakami*, 54 Cal. 3d 105, 118 (1991)) (absence of particular evidence frustrates "fully informed" and "meaningful appellate review" of reasonableness of size of award required by *Haslip*); *see Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857 (Iowa 1994) (*Haslip* requires "substantive" review of punitive award by appeals court); *Schmitz v. Aston*, 3 P.3d 1184, 1205 (Ariz. App. 2000) (*Haslip* requires independent consideration of substantive criteria by appellate court); *MacCrone v. Edwards Center*, 980 P.2d 1156, 1165 (Or. App. 1999) (*Gore* requires appeals court to "make an independent assessment of the jury's award to determine whether it is constitutionally excessive and in violation of Due Process under the [*Gore*] guideposts *without regard to the trial court's reasoning*") (emphasis added).

In *Alexander & Alexander v. B. Dixon Evader & Assoc.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991),

the Maryland Court of Special Appeals relied on *Haslip* when it vacated an excessive punitive damages award as violative of due process. The court rejected Maryland's previous punitive damages rule generally precluding appellate review of the excessiveness of a punitive damages award. The court noted that prior to *Haslip*, Maryland appellate courts could review a trial court's grant or refusal of a remittitur only "under extraordinary circumstances," using an abuse of discretion standard of review. *Alexander & Alexander*, 596 A.2d at 710. But the Maryland court ruled that under *Haslip*:

> [t]he Supreme Court may well have made a wider degree of appellate review than heretofore practiced in Maryland necessary. If faced with a punitive award that was entered upon proper procedure but which nonetheless contravenes due process because it is out of all proportion to both the harm caused and the perniciousness of the conduct, we could not, on the ground of judicial impotence, allow the unconstitutional award to stand.

Id. The Maryland court then proceeded to independently review the punitive damages award.

Moreover, some states have altered their punitive damages schemes to tighten up post-verdict review procedures. *See, e.g., Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991) (announcing substantive factors to be considered in post-trial review of punitive awards); *Crookston v. Fire Ins. Exch.*, 817

P.2d 789, 811 (Utah 1991) (tightening post-trial review standards in order to permit more substantive analysis of factors warranting punitive awards on appeal).

Conversely, other states have decided that such exacting appellate review of a punitive damages award is not necessary under *Haslip*. In such cases, the courts have ruled that an abuse of discretion standard applies and the award will stand if it "is not the result of passion and prejudice. . . ." *Williams v. Aetna Finance Co.*, 700 N.E.2d 859, 871 (Ohio 1998) (deferring to judgment of jury), *cert. denied*, 526 U.S. 1051 (1999); *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108 (Miss. 1992) (despite Court's statements in *Haslip*, Mississippi punitive damages scheme is constitutional where it preserves award unless it "evinces passion, bias and prejudice of the part of the jury so as to shock the conscience") (citation omitted); *see also Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 867 (Miss. 1995) (Supreme Court's statements in *Haslip* regarding constitutionality of Mississippi's punitive damages system were "unwarranted concerns"); *cf. Haslip*, 499 U.S. at 21 n.10 (punitive damages scheme requiring application of detailed substantive standards on review by Alabama Supreme Court "distinguishes Alabama's system from the. . . Mississippi scheme[] about which [the] Justices [have] expressed concern"). A uniform *de novo* standard of review will resolve the uncertainties created by diverse application of this Court's punitive damages law.

Interestingly, it is against this backdrop of post-*Haslip* state court precedent that this Court must consider the standard of review applicable to federal

appellate courts reviewing the constitutionality of a punitive damages award. Federal courts, sitting in diversity, must apply the substantive law of the state on punitive damages, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), but must also abide by federal procedural rules when reviewing the jury verdict. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).[3] As a result, requiring federal courts to use a deferential standard of review while many state courts apply an independent standard of review would create incongruities. *Compare Gamble*, 406 S.E.2d 350 (establishing elaborate post-trial review

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[3] The *Browning-Ferris* Court stated:

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.

492 U.S. 257, 279 (1989). While the Court also suggested that such review should be conducted under an abuse of discretion standard, the Court's *Browning-Ferris* opinion predated its determination in *Gore* that "grossly excessive" punitive damages awards may violate substantive due process rights. *Amici* believe, as discussed *supra*, that rulings on the constitutional issue implicated by excessive awards should be reviewed *de novo*.

for South Carolina courts to avoid due process violations) *with Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (noting that while *Gamble's* new South Carolina post-trial review procedures appeared similar to those held constitutional under *Haslip*, "a federal court cannot apply the *Gamble* post-verdict review process, leading to the anomalous result that a decision on a claim for punitive damages could be significantly different depending on whether the case was tried in a federal court."). These incongruities are contrary to the policies behind the *Erie* doctrine. As the Court has stated previously, "the nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction, . . a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust v. United States*, 326 U.S. 99, 109 (1945).

The possible post-*Haslip* incongruity between state and federal courts creates significant opportunities for forum-shopping on the part of both plaintiffs and defendants, resulting in wasteful and time-consuming litigation. It also would increase the "notice problems" created by the already well-documented unpredictability of punitive damages awards. *See Gore*, 517 U.S. at 574. This incongruity can – and should – be eliminated through use of the *de novo* standard of review by both state and federal courts considering the constitutionality of punitive damages awards.

IV. *De Novo* Review Will Help Assure The Development Of Clear Legal Standards And Regulate Runaway Punitive Awards

This Court has recognized that punitive damages have "run wild" in the American legal system, jeopardizing fundamental constitutional rights. *Haslip*, 499 U.S. at 18. This is, in part, a result of the free-for-all lottery-like aspect of punitive damages awards. Plaintiffs can "roll the dice" and try their luck with juries, who, with little guidance on assessing punitive awards, often award windfall amounts. This casino-like atmosphere is encouraged by the lack of a clear set of legal principles governing the excessiveness of these awards.

The size of punitive damages awards already vary dramatically from jurisdiction to jurisdiction – even for the same or similar conduct.[4] If the constitutionality of punitive awards is reviewed only for "abuse of discretion," the development of clear precedent to guide future courts in their assessments

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[4] A study of 47 counties in 11 states over a several-year period showed a high degree of variability: Punitive damages were awarded in about 25 percent of the successful verdict cases in some counties and not awarded at all in others. Median verdicts ranged from less than $10,000 in some areas to as much as $204,000 in others. *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 31-32, 42 (1990).

of such damages will be prevented. As this Court noted in another constitutional context:

> [a] policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.

Ornelas, 517 U.S. at 697 (*quoting Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

The resulting lack of clear legal standards will frustrate the twin goals of punitive damages – deterrence and retribution. Absent consistent legal standards on the constitutional excessiveness of punitive damages awards, defendants have little notice of the punishment they are likely to receive under certain circumstances. Arbitrary and inconsistent punishments with little discernible relationship to a defendant's activities provide little incentive for the defendant to change its behavior.

De novo review will allow federal appellate courts to develop clear guidelines for the lower courts as to when a punitive award becomes "grossly excessive." "[A]n appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions." *Russell*, 499 U.S. at 233. Trial courts would thus be required to apply concrete standards in reviewing those decisions. This should ultimately decrease the number of appeals of punitive awards. As a state trial judge wrote:

> If there are clearly defined guidelines on the awarding of punitive damages, the awards of lower courts would more likely be sustained and needless litigation of the amounts of the awards would be reduced.

Douglas Harkin, BMW of North America, Inc. v. Gore: *A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damages*, 60 Mont. L. Rev. 367, 383 (1999).

Most importantly, the consistent application of clear legal standards developed through *de novo* review "helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *See Gore*, 517 U.S. at 587 (Breyer, J., concurring).

CONCLUSION

For the foregoing reasons, *amici* request that this Court mandate a *de novo* standard for appellate review of the excessiveness of punitive damages awards.

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